

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Office of Conservation and Coastal Lands  
Honolulu, Hawaii 96813

October 14, 2022

Board of Land and Natural Resources  
State of Hawai'i  
Honolulu Hawai'i

REGARDING Request for approval to hold statewide public hearings to amend and compile Title 13, Chapter 5, Hawai'i Administrative Rules regarding the Conservation District.

The proposed rule amendment can be reviewed in person at the Office of Conservation and Coastal Lands (OCCL), 1151 Punchbowl Street, Room 131, Honolulu, Hawaii 96813, from 8:00 am to 3:30 pm, Monday through Friday, except state holidays. The proposed rules, including a statement on the topic of the proposed rule amendments, can be reviewed online at: [ltgov.hawaii.gov/theoffice/administrative-rules/proposed-changes](https://ltgov.hawaii.gov/theoffice/administrative-rules/proposed-changes). The proposed rules can also be viewed online at: [dlnr.hawaii.gov/occl/rules](https://dlnr.hawaii.gov/occl/rules). Location and contact information for OCCL is available online at: <https://dlnr.hawaii.gov/occl/>.

LOCATION Statewide

**REQUEST**

The Office of Conservation and Coastal Lands (OCCL) wishes to amend its administrative rules relating to the Conservation District (**Exhibit 1**). The purpose of this staff report is to explain the proposed changes, seek the Board's approval to proceed with the amendment process, and to hold public hearings.

**CONSERVATION LANDS**

Hawai'i State law divides lands into four land-use classification districts: urban, rural, agriculture, and conservation. Pursuant to Hawai'i Revised Statutes Chapter 183C, *lands within the state land use conservation district contain important natural resources essential to the preservation of the State's fragile natural ecosystems and the sustainability of the State's water supply*.

Conservation lands, which can be public or privately-owned, make up close to half of the land in the state. Submerged lands from the shoreline seaward to the extent of the State's jurisdiction, are also classified as Conservation.

The use of Conservation Lands is regulated by Hawai'i Administrative Rules (HAR) Chapter 13-5. OCCL is responsible for regulating land uses in the Conservation District in accordance with 13-5.

## HISTORY

State-wide zoning was established by the first State Legislature with the 1961 Land Use Law ( Act 187 SLH 160) . It was the first statewide land regulatory system in the U.S. The Land Use Law created the Land Use Commission, and directed it to divide the state into four districts: conservation, agriculture, rural, and urban. Land uses in the new Conservation District were subject to the sole regulation of the Department of Land and Natural Resources. It is the only district where county governments do not exercise zoning powers.

The original proposed conservation district boundaries were coterminous with the boundaries of the existing Forest and Water Reserve Zones. These boundaries were extended to include erosion-prone areas, wilderness areas, and areas “of outstanding scenic quality.”

The first administrative rules governing land uses in the Conservation District were contained in Department Regulation 4. Regulation 4 established two subzones: GU (General) and RW (Restricted Watershed).

Permitted land uses in the GU subzone included many which would not be identified as “conservation” today, such as hotels, resort ranches, trailer parks, golf courses, military training facilities, airstrips, and sawmills.

In 1977 DLNR published the Conservation District Plan that aimed to better define what a “conservation use” was. Regulation 4 was amended the following year with the creation of four new conservation subzones: protective, limited, resource, and general. A fifth, “special” subzone, was retained.

In 1978 amendments to the State Constitution called for the conservation and protection of Hawaii's natural beauty and natural resources. In response, Regulation 4 was replaced by HAR 13-2 in 1981. Under the new rules ‘urban’ type uses such as hotels, resorts, and restaurants were no longer allowed in the conservation district.

Questions remained regarding the appropriateness of allowing residential construction in the Conservation District. After requests were made to build single-family homes in two environmentally sensitive areas, Olomana on O'ahu and Hāwea on Maui, the 1990 Legislature, in Senate Concurrent Resolution 150, requested that the State Auditor determine the adequacy of the existing statutes and rules, and to examine the review and approval process.

In 1991 the Auditor released their report, titled Review of the Regulations of Residential Construction in the Conservation District. The report found that forest and water reserve zone laws that the conservation district rules were based on named residences as a *possible* permitted land use in the conservation district; it also found significant problems in the regulatory framework, with the inappropriate identification of projects as “nonconforming,” with the implementation of the statutes and rules, and with inadequate environmental assessments.

The Report recommended that DLNR pursue legislation amending the forest and water reserve zone laws. In 1994 the Legislature approved Act 270, which extricated Conservation District regulations from the Forest Reserves Statutes by giving it its own chapter. This was codified as Chapter 183C, HRS.

In the same year new administrative rules were adopted, and HAR Chapter 13-5 became the new implementing tool of the new statutes.

The new rules retained all of the subzones, but introduced some significant changes in the regulation of land uses, including:

- Identifying specific land uses that could be applied for. Land uses that were not identified would, by definition, no longer be allowed;
- Developing eight criteria for the evaluation of permit applications. Incorporation of permit criteria represented a significant shift in regulatory approach, as decision-making in the past was heavily reliant on precedent rather than adherence to written guidelines.
- Developing a permit hierarchy which allowed for major and minor permits. This allowed less significant projects to be processed on an expedited basis.
- Developing standards for single-family residence construction, including requirements for minimum lot size, maximum house size, height restrictions, etc.
- Defining land use as the placement of any solid material on land that remained for more than fourteen days, or which causes a permanent change in the land area on which it occurs. "Activities" as opposed to "land uses" would now be regulated on state lands by the respective state division that the land was encumbered to.

In 2010 the Office of Conservation and Coastal Lands held a series of public hearings on proposed amendments to Chapter 13-5. No structural changes were proposed to the rules, but over the years OCCL had identified many elements within the rules that could be modified, such as: clearing up unclear and ambiguous language; redefining land use as the placement of any solid material on land that remained for more than thirty days, rather than fourteen days; and clarifying many of the single-family residential standards.

In addition, four new land uses were added:

- Power Generation from Renewable Resources: These projects had previously been processes under "public purpose uses;"
- Land and Resource Management: This land use consolidated many activities that had fallen under other land uses, and clarified what actions that could be considered maintenance activities that would not require a permit;
- Shoreline Erosion Control: This replaced "seawalls and shoreline protection," and clarified that an application for this use must show that: (1) the applicant would be deprived of all reasonable use of such land or building without the permit; and (2) public facilities (e.g. public roads) critical to public health, safety, and welfare would be severely damaged or destroyed without a shoreline erosion control structure, and there are no reasonable

alternatives (e.g. relocation); and (3) the use will not adversely affect beach processes or lateral public access along the shoreline, without adequately compensating the State for its loss.

- “Beach Restoration” was added to provide for major and minor permits consistent with the State’s Small Scale Beach Nourishment permitting program.

The amendments were approved in 2011.

## **2022 PROPOSED AMENDMENTS**

OCCL began a comprehensive internal review of the rules in 2018. Staff found that the current rules were inadequate to address the on-going environmental crisis triggered by climate change, and is proposing significant modifications to the way the Department addresses land uses in the shoreline and sea level rise exposure area, emergency authorizations, resource protection and restoration, and hazard mitigation.

OCCL also identified the “Conservation Criteria” by which applications are evaluated as being vague and ambiguous, and is proposing a significant strengthening of these criteria.

We have also found that the public is often confused by the naming conventions we use for the different permit levels. We are proposing that land uses that do not require a permit be consolidated under the new §13-5-21 Routine actions (a) Routine maintenance, and (b) minor actions. We also propose a new naming convention for permit levels, using SPA for Site Plan Approvals, DEP for Departmental Permits, and BRD for Board Permits.

In response to community concerns regarding the spread of resort-style vacation homes in the Conservation District, we are proposing to tighten the standards regarding single family residences to bring them in line with the original intent of the law.

Another significant change is that we are proposing to identify land uses and permitting levels appropriate to the Special Subzone. Currently there are none in the rules.

Finally, we are proposing amendments that recognize two statewide programs that have been approved by the BLNR: the *Hoala Loko I’a* program for the repair, maintenance, and operation of traditional fishpond systems, and the small-scale beach restoration (SSBR) program, the successor to the small-scale beach nourishment program.

*(note: the SSBR is currently the subject of a contested case request; pending the outcome this section might need to be adjusted)*

A full list of the proposed amendments is in the following section.

## LIST OF PROPOSED CHANGES

### §13-5-2 Definitions

- Amend “average annual coastal erosion rate” to read “average annual shoreline change rate” to reflect the fact that shorelines are dynamic environments
- Add a definition of “beach” to provide greater clarity.
- Replace “coastal erosion study” with “historical shoreline change study” and include modern technologies such as drones and satellite imagery as valid tools for analysis.
- Add “coastal hazards” to provide clarity on sections of the rules dealing with emergency permits.
- Add “coastal hazard mitigation disclosure statement” in reference to proposed new requirements for land uses along the coast.
- Amend “coastal high hazard area” to reference a 1-percent annual chance flood event instead of a hundred-year flood, in accordance with standard Federal Emergency Management Agency terminology.
- Add “emergency shoreline hardening” to provide clarity between emergency and on-going crises while clarifying that it is a temporary land use.
- Add “Hoala loko ia program” to reflect the incorporation into the rules of a streamlined process for traditional fishpond restoration.
- Add “intactness” to assist in the evaluation of a land use’s potential impacts.
- Amend “invasive species” to be more concise.
- Add “landscape plan” to clearly define what is required in one.
- Add “landscaping” to provide clarity in the rules.
- Add “legal lot of record” to provide clarity in the rules on what is meant by ‘lot.’
- Amend “management plan” to reflect that it is a long-term planning document.
- Add “native habitat restoration” to reflect a proposed new land use in the rules.
- Add “property” to provide clarification that it is real property.
- Add “renewable energy” to support a new proposed land use.
- Amend “repair, maintenance, operation” to clarify that this is for authorized or legally nonconforming structures.
- Add “sea level rise exposure area” as this will be a major tool in evaluating proposed land uses in coastal areas.
- Add “shed” to provide limits to what can be applied for under this land use.

- Add “shoreline hardening” to provide a clearer definition of what hardening means, and to differentiate them from structures designed to stabilize beaches.
- Add “shoreline setback” and “shoreline setback line” to reflect their inclusion in Exhibit 6 on single family residential standards.
- Add “small-scale beach restoration program” to reflect its inclusion as a new proposed identified land use.
- Add a definition of “storm and seismic waves” as that term is used in the definition of “shoreline.”
- Remove “temporary variance” as it is not referenced in the proposed rules.
- Add “unmanaged hazardous condition” to differentiate on-going crises from short-term emergency crises.
- Remove “wilderness area” as it is not referenced elsewhere in the rules.

#### §13-5-3 Appeals

- Amend to reflect that appeals of any final order of the department or board will be heard by the circuit environmental court in accordance with Chapter 91, HRS and the Hawaii rules of civil procedure.

#### §13-5-6 Penalty

- Amend to reflect that no applications shall be processed for applicants with pending violations and that an administrative sanctions schedule has been approved by the board.

#### §13-5-7 Nonconforming uses and structures

- Amend section to clarify that land uses can be nonconforming rather than just structures.
- Amend to include references to floodplain management regulations.
- Amend to clarify that it is an applicant’s responsibility to show that the repair to not exceed fifty percent of the replacement cost, to provide a professionally licensed construction estimate, and supporting documentation
- Amend to include a provision that structures in a flood zone can adjust the dimensions or locations of the nonconforming structure to minimize risks from flooding and erosion, or to comply with requirements with the National Flood Insurance Program.

#### §13-5-12 Limited Subzone

- Simplify the definition to note that the subzone encompasses lands susceptible to flooding and major erosion and landslide damage.

- Remove references to public welfare as redundant, and to shift emphasize that the focus is on protecting public health and safety.
- Include sea level rise and subsidence as potential hazards.

#### §13-5-17 Boundary determinations; criteria

- Provides that applicants for permits for land use within fifty feet of a subzone boundary need only seek a boundary determination when the department, in its discretion, decides a boundary determination is necessary.

#### §13-5-21 Routine actions requiring no permit from the department or board

This is a new section that consolidates land uses that had previously been identified as “A-1” in sections 22 through 25. These are often maintenance activities that do not trigger the need for a permit, and land uses that do not trigger the need for a permit, and listing them under permitting requirements has caused confusion among members of the public. Pulling these land uses under a separate section is intended to provide more clarity.

#### §13-5-22, 23, 24, 25 Identified land uses (general notes)

The following proposed changes apply to land uses in all subzones. They are listed compiled here for efficiency’s sake, rather than individually each time they appear in the rules.

- Move (A-1) land uses to the new section 13-5-21, as discussed above
- Change the nomenclature used to identify permit types, so that Site Plan Approvals are denoted by “SPA” rather than “B,” departmental permits by “DEP” rather than “C,” and board permits by “BRD” rather than “D.” This is intended to make reading the rules more intuitive.
- Add language that land uses might be subject to other requirements, such as county building permits, floodplain management regulations, and management plans.
- When management plans are mandated, remove the requirement that they be approved *simultaneously* with the permit application, but rather be *reviewed* simultaneously with the permit. This proposed change reflects the fact that a management plan is not a land use *per se*, but an element of the land use.
- Require coastal hazard mitigation disclosure statements for proposed land uses in the SLR-XA, or coastal high hazard area. This new requirement will ensure that landowners are aware of the risks of developments in coastal properties. The requirements of a disclosure statement will be appended to the rules as an exhibit.
- The department or board currently reserves the right to require departmental or board approval on Site Plan Approvals when the action may cause significant negative secondary

impacts. Rather than state this repeatedly under each land use, it will be stated once §13-5-22

§13-5-22      Identified land uses in the Protective Subzone

- Add repair, restoration, maintenance, and operation of traditional Hawaiian fishpond systems as a new Site Plan Approval, and note that the application fee for these permits is waived. This is to acknowledge the success of the Hoala Loko Ia program, and to embed the streamlined process in the rules.
- The rules currently allow for single family residences if that use was historically, customarily, and actually found on the property. The proposed rules add a note that these residences will be subject to current development standards.
- “Removal of Invasive Species” was placed under “Land and Resource Management.”
- Add a notation that nonconforming structures and shoreline structures are *not* included in the general category that allows a Site Plan Approval for the replacement or construction of existing structures. A separate section has been added for shoreline structures, for which more stringent requirements are being proposed.
- Modify the section on renewable energy projects so that only projects over 50 kW will now trigger the need for a Board permit. Projects under 50kW that are accessory to existing facilities will require a Department permit, and smaller projects under 5 kW a Site Plan Approval. This change is intended to promote the use of renewable energy by easing the permitting requirements for smaller scale projects.
- Add “sea water air condition systems” as a specific land use requiring a board permit. Similar projects had previously been processed as a “public purpose use.”
- Add new Site Plan Approval categories under “Land and Resource Management” for small land uses that had not been previously identified. As such, many small projects ended up requiring full CDUPs. These changes are designed to better allow landowners to manage their land in a sustainable manner. New SPA-level land uses are:
  - Native habitat restoration in an area greater than one acre, where the restoration has been developed in consultation with the Division of Forestry and Wildlife.
  - Installation of maintenance sheds, entry gates, and security fencing.
  - Cultivation and transplantation of coral species, where the project has been developed in consultation with the Division of Aquatic Resources.
- Remove “major erosion control structures” as a category and place the existing land uses under either “shoreline hardening” or “rockfall mitigation,” as appropriate.
- Change the title of “telecommunications” to “communications systems.” No new land uses are proposed under this section, but the language has been updated to provide specific dimensions on modifications that will require a site plan approval versus a board permit.



- Significantly amend the section on “shoreline hardening” (formerly “shoreline erosion control”). The new title is designed to reflect exactly what is being proposed. The former section was no longer compliant with current State law on shoreline hardening. The changes are designed to provide greater clarity on the requirements for repairing an existing structure, and to provide strict guidelines on the installation of temporary structures. They are also designed to prevent the installation of “temporary” structures that are de facto permanent structures, and to provide a means for their removal if needed. Specific changes include:
  - For the repair of existing structures, require that the applicant show that the repairs will not affect beach processes or lateral public access
  - For repair of existing structures, require that the applicant show, if requested by the department, two professionally licensed construction estimates along with the size and dimensions of the original structure.
  - For the repair of existing structures, require that all work be conducted by a professionally licensed contractor.
  - Create a new use of “temporary shoreline hardening” that will be used in lieu of the current practice of issuing emergency permits. These will be considered for areas where the ‘emergency’ is on-going and has become an ‘unmanaged hazardous condition.’ To apply under this use an applicant will need to demonstrate that they are working on a long-term solution – such as relocation, abandonment, or beach restoration - which will enable them to remove the temporary structure.
  - Allow for the department to require a surety bond or other legal or financial assurance to guarantee the removal of the temporary structure at the end of the permitted time period.
  - Private shoreline hardening projects, such as seawalls and revetments, will be limited to areas that do not have sandy beaches, where the project will not interfere with recreational and other waterline activities, and where there are no other reasonable options.
  - Public shoreline projects will now require a shoreline certification, and applicants must submit a coastal hazard mitigation statement.
- Beach restoration proposals are currently processed under the Board-approved Small Scale Beach Nourishment (SSBN) program, which delegates to the Chair the authority to approve project of up to 10,000 cubic yards. The section on “beach restoration / sand placement” has been updated to reflect the adoption by the Board of the Small Scale Beach Restoration (SSBR) program. While the exact parameters of the final SSBR, and its implementation, are still subject to change pending the outcome of a contested case request, the significant differences include:
  - SSBR will include sand pushing, which is currently not regulated.
  - SSBR will limit sand nourishment to the historical shoreline area.

- SSBR will limit the amount of allowable fine particles in the sand used in the project, from 6% to 2%.
- SSBR will significantly increase the number of required best management practices for sand nourishment.
- Given the stricter controls, SSBR will allow for up to 25,000 cubic yards under the program.
- Projects that do not comply with either the standards of the proposed SSBR or the current SSBN programs will continue to require a full Board permit.
- Add a section on “rockfall mitigation.” These projects were previously considered under the same land use that included shoreline erosion control. Identifying this as a separate land use allows OCCL to develop specific guidelines for rockfall mitigation, and to identify the types of mitigation that will be allowed.

#### §13-5-23      Identified land uses in the Limited Subzone

The limited subzone encompasses lands where natural hazards, such as floods or landslides, limit the amount of development. Four changes are proposed for this section:

- Agriculture currently requires either a departmental or board permit. A new Site Plan Approval permit is proposed for non-commercial agriculture in an area under 5000 square feet. This is designed to allow families to grow crops or raise enough animals to feed a family, without needing to go through a lengthy permitting process.
- Current rules on landscaping require that trees be planted on a one-to-one basis, and the permitting level is based upon the number of trees removed. This is not always appropriate. Some trees, such as waiwi (strawberry guava), grow quickly and in dense thickets, and there is no ecological need to replace each single one with a new tree. The language under ‘landscaping’ will be adjusted to count the number of trees of a certain size, and to note that replanting will be required ‘as appropriate.’
- The current rules do not specifically address decorative rock walls, and land owners have been required to seek full board permits to build a wall. A new land use will be added that will require departmental permits for rock walls that are not associated with erosion control projects.
- The current rules do not allow for single family residences in the limited subzone, with an exception carved out for properties in a coastal high hazard area or a flood zone provided they comply with flood zone regulations. There are a handful of properties on the Kona coast of Hawai‘i that are in the Limited Subzone, but where only portions of the property are in the flood zone. The current rules force proposed residences to build *in* the flood zone. OCCL proposes removing this exception, and to remove ‘single family residences’ from being an identified land use in the limited subzone. Those landowners would retain the option of seeking a rule change to rezone the portions of their property that are not in the flood zone.

§13-5-24      Identified land uses in the Resource Subzone

No new land uses are being proposed for the resource subzone. The only significant proposed change relates to the existing land use “mining and extraction.” The section will be updated to note that proposals for geothermal uses will be processed under the “renewable energy.”

§13-5-25      Identified land uses in the General Subzone

No new land uses or significant changes are being proposed.

§13-5-26      Identified land uses in the Special Subzone

There are eight “special” subzones in the conservation district. These parcels contain land uses that fall outside the four standard subzones, such as Sea Life Park on O`ahu, Miloli`i on Hawai`i, and Limahuli Valley on Kaua`i. There are currently no identified land uses in the rules for the special subzone; as such the department has not had the administrative framework to evaluate permits for work in these areas.

The proposed rules will establish a new section for “identified land uses in the special subzone” with four parts:

- The rules will acknowledge land uses that were previously authorized under either a master plan or environmental document on file with the department.
- Land uses not previously identified, but that are consistent with the specific special subzone designation, will require a site plan approval.
- Other land uses will be reviewed by the department to determine the appropriate level of permitting.

§13-5-30      Permits, generally

This section contains the eight conservation criteria by which permit applications are evaluated. The current criteria are vague and repetitive, and staff finds that they do not afford the necessary framework to fully evaluate the environmental and cultural impacts of a proposed land use. These will be replaced by the following set of nine criteria that are much more robust and focused:

- General: This section combines many of the existing criteria into one section that focuses on the goals and objectives of the subzone, the application of best management practices, a ban on subdivision that will result in an increase in the intensity of land use, and compliance with the Coastal Zone Management Act.
- Streams and Wetlands: A set of five criteria designed to protect the State’s water resources.

- Native Ecosystems and Endangered Species: Three new criteria designed to comply with provisions in Hawai'i Revised Statutes Chapter 195D, to protect native ecosystems, to minimize the introduction of invasive species, and to promote appropriate landscaping plans.
- Coastal Resources and Hazards: Four new criteria designed to protect dune and beach resources, nearshore wave patterns, and marine and nearshore ecosystems.
- Recreation and Access: A new criteria designed to minimize a land use's interference with public trails, recreation areas, and beaches.
- Scenic Resources: Four new criteria designed to minimize visual encroachments to cultural landscapes and scenic monuments.
- Steep Slopes: Four new criteria that address development on steep slopes, such as minimizing earth movement, avoiding cut-and-fill, and protecting a land's natural drainage patterns.
- Historic Resources: A new criteria that addresses compliance with HRS Chapter 6E, the Historic Preservation Program.
- Traditional and Cultural Practices and Resources: Three new criteria that require that an applicant identify the cultural, historical, and natural resources in which traditional and customary rights are exercised, the manner in which these practices would be impacted by a project, and mitigation measures to protect those practices.

#### §13-5-31 Permit applications

OCCL proposes that applications should include a statement identifying the cultural, historical, and natural resources, including traditional and customary practices, that occur on a parcel, and that applicants discuss potential impacts to them. While this is already part of the standard application that OCCL uses, it has not been required by the rules.

The requirement to have a shoreline certification can currently be waived if an applicant shows that the land is not subject to coastal hazards. OCCL proposes to also be able to waive the requirement if a certification is not needed to determine shoreline setbacks.

#### §13-5-32 Fees

OCCL proposes to allow the chairperson to waive filing fees on applications by non-profits where the purpose of the project is to preserve and protect the natural or cultural resources of Hawai'i.

#### §13-5-35 Emergency permits

The rules currently allow the chairperson to issue emergency permits when there is an imminent threat to public health or safety. This has been an important tool for the Department when addressing short-term emergencies such as floods, landslides, tsunamis, and storms. The current

system has not been effective in addressing the long-term and on-going crisis caused by rising seas and shoreline erosion. OCCL proposes severely limiting the use of emergency permits for shoreline erosion control such that: permits can only be issued for one year, and only be renewed once, and only when an inhabited dwelling or public facility is threatened.

For cases where a dangerous situation lasts longer than one year, it will be classified as an “unmanaged hazardous condition” rather than an “emergency.” Permits will be required for these situations pursuant to the proposed changes under §13-5-22 Identified land uses in the protective subzone , P-15 Shoreline Hardening.

In order to prevent abuses to the system, applicants will be required to develop a long-term solution that will enable them to remove the temporary erosion control method. These solutions can include relocation or abandonment of the structure, beach restoration, or some other form of shoreline stabilization. In addition, a surety bond or other legal or financial assurance may be required to guarantee removal of temporary land uses at the expiration of the permitted time period.

#### §13-5-36 Temporary variance

The Board has not granted temporary variances pursuant to this section nor has OCCL received any applications for temporary variances since the current rules were implemented. OCCL thus recommends that this section be repealed.

#### §13-5-38 Site plan approvals

The chairperson can currently recommend that a departmental permit be referred to the Board when the scope of the project or the public interest warrants it. There is currently no mechanism to similarly move up site plan approvals. OCCL proposes adding language giving the chairperson the authority to require departmental or board permits for site plan approvals as needed.

#### §13-5-39.5 Coastal hazard mitigation disclosure statement

This is a new section. OCCL is proposing that a disclosure statement be filed by applicants for land uses in a coastal high hazard area. The purpose is to force land users to address the realities of coastal erosion and sea level rise. The details of the statements will be appended to the rules as Exhibit 5. The requirements will include:

- A discussion of the potential hazards based upon 3.2 feet of sea level rise;
- A discussion of the historical hazards that have impacted the project area;
- A plan for adaptation to avoid or minimize the impacts of hazards;
- A discussion of the potential impacts of known hazards over the lifetime of the project; and
- A conceptual timeline that contains discreet actions and the triggers for them.

#### §13-5-41.1 Fire buffer zone

OCCL has never received an application for a fire buffer zone, and we propose repealing this section. Fire buffer zones can be considered a form of landscaping, and do not appear to require their own unique identified land use.

#### §13-5-42 Standard conditions

There are currently 26 standard conditions that are a part of any permit, where appropriate. OCCL proposes the following amendments to the standard conditions:

- Reduce the number of hard copies of documents that need to be submitted, and allow for digital submittals as appropriate;
- Add language clarifying that any county grading permits, elevation certificates, or building permits should also be filed with the department;
- Require that single family residential developments along the shoreline file a restrictive covenant that stipulates that shoreline hardening structures are prohibited, excepting those that are part of a beach restoration project approved by the board;
- Require that single family residential developments along the shoreline record a covenant holding the state harmless from any liability, claim, or demand from property damage resulting from the effects of coastal hazards;
- Add language clarifying that property owners acknowledge the risks associated with ownership of beachfront property.

In addition, OCCL proposes new language regarding deviations from the standard conditions. Currently the rules note that deviations shall not result in adverse impact to natural resources. OCCL proposes including cultural resources in this section. We also propose language stating that deviations shall not increase the exposure to natural hazards.

#### §13-5-43 Time extensions

The rules currently provide a process for requesting extensions on departmental and board permits, but do not address other types of permits. OCCL proposes adding new language allowing the department the discretion to grant time extensions on site plan approvals.

OCCL also proposes requiring a filing fee for time extension requests - \$25 for site plan approvals and \$100 for departmental and board permits.

Exhibit 1: Penalties Schedule

The penalty schedule for calculating fines for Conservation District violations was approved by the Board in September 2009. It is not currently included as an exhibit, although it is referenced in section 13-5-6, Penalty Schedules.

Exhibit 4: Management Plan Requirements

There are a number of land uses that require the approval of an associated management plan. OCCL finds that some of the requirements are redundant, as they request information that is already required in a standard application. We propose removing the following:

- A natural resource assessment. This is already a part of a standard environmental assessment.
- A description of mitigation measures. This is already required in a standard application.
- A description of existing and proposed uses and facilities. This is already required in a standard application.

In addition, OCCL proposes tightening up the language in other sections to provide greater clarity to the applicant.

Exhibit 5: Coastal Hazard Mitigation Disclosure Statement

OCCL is proposing that applicants for land uses in the coastal high hazard area sign a disclosure agreement that acknowledges the risks associated with impacts from climate change and sea level rise. This will be a new requirement.

Briefly, these statements will require:

- A discussion of the impacts that 3.2 feet or more of sea level rise will have on the land use, or 6.0 feet for public infrastructure projects;
- A discussion of the coastal hazards that have historically impacted the project site;
- A discussion of the potential property damage, and plans for adaptation to reduce or mitigate potential damage to the state's public and natural resources;
- For each hazard identified, a discussion of potential impacts over the lifetime of the project; and
- A conceptual timeline that proposes discrete actions based upon potential triggers; these actions are to include potential relocation of the development outside of the hazard area.

Exhibit 6: Single Family Residential Standards

The current single family residential standards were established in 2011. OCCL is proposing changes to the standards that address coastal hazards, that better define the limits of building on steep slopes, that clarify how to measure the developed area of a residence, and that tighten the prohibitions on vacation rentals.

We have noticed a significant increase over the past decade in large, multi-bedroom multi-bathroom homes that appear to operate as luxury vacation homes and resorts rather than actual family residences. We are proposing significantly tightening the maximum size of residences in the Conservation District.

Specific changes include:

- For properties subject to coastal hazards: requiring post-and-beam or post-on-pier construction rather than slab-on-grade; limiting the developable area to 2500 square feet; and prohibiting building in the SLR-XA when there are buildable areas on the same parcel outside the SLR-XA or coastal high hazard area.
- Increasing the shoreline setback from forty to sixty feet, plus 70 times the annual erosion rate.
- Allowing the department to require larger setbacks for coastal high hazard areas.
- Clarifying that the developed area of a residence includes lanai, pool decks, equipment buildings, and sheds.
- Reducing the allowable developed area on lots:
  - For lots up to 14,000 square feet, reducing the maximum developable area from 3500 to 1500 square feet;
  - For lots from 14,000 square feet to one acre, reducing the maximum developable area from 3500 to 2500 square feet;
  - For lots larger than one acre, reducing the maximum developable area from 5000 to 3500 square feet;
  - On parcels with general slopes of 20% to 30%, reducing the maximum developable area by 30%; and
  - Prohibiting residences on parcels with a general slope over 30%.
- Clarifying that a building's elevation is measured from the lowest part of the structure's foundation at natural grade and at the highest point of the structure's roof.
- Strengthening the language regarding a structure's compatibility with the surrounding environs in the following ways:
  - Noting that the residence not be designed to allow for independent subunits;



- Requiring appropriate landscaping that screens a structure from public view plains;
- Requiring that residences comply with all State Department of Health guidelines;
- Note that the proposed development minimizes disturbed land area.

#### **AMENDMENT PROCESS**

Statutes and rules which govern the process by which amendments of the Chapter are made, may include:

- A. Hawai'i Revised Statues (HRS) Chapter 91, Administrative Procedures, Sections 2-7;
- B. Hawai'i Administrative Rules (HAR) Chapter 13-1;
- C. HRS Title 13, Planning and Economic Development, 201M Small Business Regulatory Flexibility Act; and
- D. HRS Chapter 183C, Section 4(f).

Petitions to amend the administrative rules are reviewed by the Legislative Reference Bureau and the Department of the Attorney General. With Board approval the proposed rule change will be submitted to those agencies for review. In general, in order to take effect, proposed rule amendments must obtain departmental and gubernatorial authorization for both public hearing and final approval.

#### **AUTHORIZATION FOR PUBLIC HEARING**

The first major step to amend the administrative rules is to hold a public hearing(s). The request for public hearing(s) is the subject of this staff submittal. Should the Board of Land and Natural Resources (Board) approve the subject request, the department would forward the request for public hearing(s) to the Governor for approval. At the Board's discretion, the Board may modify the proposed rule change at this time.

#### **APPROVAL/DISAPPROVAL**

After public hearing(s), the second major step would be to seek the Board's discretion to forward the proposed rule change to the Governor for approval. The Board may also modify the proposed rule change at that time, and can recommend that the proposed changes go out for additional public hearings. Both the Legislative Reference Bureau and the Department of the Attorney General would review, and the Department of the Attorney General approve as to form, the proposed rule change prior to forwarding the proposed rule change to the Governor for decision.

## **STATE POLICIES AND PROCEDURES**

The Governor of the State of Hawaii has issued Administrative Directive No. 18-02 to guide policy and procedures for the adoption, amendment or repeal of administrative rules. The Governor directs that petitions for administrative rule changes address certain policy topic areas. By this submittal, staff proposes that the general content of this petition be transmitted to the Governor's office along with any approved request for public hearing.

## **SMALL BUSINESS REGULATORY FLEXIBILITY ACT**

Proposed rules that affect small businesses are required to file a Small Business Impact Statement. The proposed rule amendment is not anticipated to impact small businesses. Staff will consult with the Small Business Regulatory Review Board prior to going out for public hearing.

## **STAFF RECOMMENDATION**

That the Board of Land and Natural Resources:

1. Authorize the forwarding of a request for public hearings to the Governor, State of Hawai'i, on the proposed rule amendments;
2. Upon executive approval, publish public hearing notices; and
3. Delegate the Chairperson the authority to appoint a hearing officer to conduct the aforementioned public hearings.

Respectfully Submitted,

*S Michael Cain*

MICHAEL CAIN, Administrator  
Office of Conservation and Coastal Lands

Approved for Submittal:

SUZANNE D. CASE, Chairperson  
Board of Land and Natural Resources